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## P R O C E E D I N G S

AUGUST 3, 2020

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THE COURT: Thank you. Be seated.

03:53:08

All right. Mr. Gerstein.

MR. GERSTEIN: Yes, this is Mr. Gerstein.

THE COURT: Okay. I have Mr. Fennell on a  
different phone, and a couple of live bodies.

Who wants to take the lead for Mr. Willey?

03:53:23

MR. GERSTEIN: That will be me, Your Honor.

This is Mr. Gerstein.

THE COURT: All right. Mr. Gerstein, why is  
the suit brought in his name rather than the name of his  
charity?

03:53:36

MR. GERSTEIN: I'm sorry. Your Honor, I did  
not hear that.

THE COURT: Why is the suit brought in Willey's  
name rather than the name of the charity that he purports  
to run?

03:53:51

MR. GERSTEIN: Thank you, Your Honor.

Mr. Willey at the time that he did the  
acts complained of in the complaint was doing so in his  
private capacity. He is an employee of the nonprofit  
organization, but he also maintains a private practice, so  
this suit seeks to vindicate his individual rights.

03:54:03

1 THE COURT: All right. So the charity has  
2 nothing to do with this case, then? We're talking about --

3 MR. GERSTEIN: That is correct.

03:54:15

4 THE COURT: -- his opportunity. Would it  
5 surprise you to learn that the charity has lost its  
6 standing with the IRS?

03:54:30

7 MR. GERSTEIN: My understanding, Your Honor, is  
8 that the charity is currently engaged in similar conduct,  
9 if that was the question. I did have a little trouble  
10 hearing you. I'm sorry.

03:54:55

11 THE COURT: All right. According to the  
12 charity's own website, it says they lost in, I think it's  
13 2018, and they are in negotiations with the IRS to resume.  
14 Perhaps that's why Mr. Willey is bringing it in his own  
15 name.

03:55:10

16 MR. GERSTEIN: I can represent to the Court  
17 that since the filing of this suit, Mr. Willey has become  
18 chief executive officer of the nonprofit organization, and  
19 it has experienced a significant increase in fundraising  
20 over the last four or five months. But at the time he  
21 brought this suit, he was practicing as a private criminal  
22 defense attorney, and that was the purpose of bringing it  
23 in his own name.

03:55:35

24 THE COURT: What -- so we can eliminate  
25 everything in the complaint that alludes to charity and the

1 downtrodden, and just he's a lawyer who is sending letters  
2 about the quality of representation by existing counsel.  
3 Those are the facts now?

03:56:04

4 THE CASE MANAGER: Are you going to use the  
5 cell phone?

6 THE COURT: She couldn't make it work. So --

7 THE CASE MANAGER: Okay.

8 THE COURT: We are still trying to improve the  
9 phone situation.

03:56:13

10 MR. GERSTEIN: That sounds much better, Your  
11 Honor. If you would like, I can clarify.

12 I mean, in his private capacity he was  
13 working entirely on a volunteer basis for the downtrodden.  
14 So I don't think we would want to eliminate those

03:56:27

15 components of the complaint, but the suit is brought in his  
16 own individual name.

17 To update the Court on subsequent  
18 developments, though, and to be completely candid, just so  
19 there is no misunderstanding, the nonprofit organization  
03:56:39 20 engages or at least prior to the this lawsuit engaged in  
21 similar conduct and would, if Mr. Willey prevails in this  
22 suit, intend to engage in similar conduct in the future,  
23 but --

24 (Phone call placed over Court's system.)

03:57:03

25 MR. GERSTEIN: Hello, this is Charles Gerstein.

1 THE COURT: All right. Can you hear me now?

2 MR. GERSTEIN: Yes, I can. Thank you.

3 THE COURT: All right. You're coming over the  
4 main section. Now we have got to get Mr. Fennell.

03:57:19 5 MR. GERSTEIN: Thank you.

6 THE COURT: All right. You still there?

7 MR. GERSTEIN: I am. Thank you, Your Honor.

8 THE COURT: Okay. Now we're going to work  
9 on --

03:57:27 10 THE CASE MANAGER: I can't join more than one  
11 person.

12 THE COURT: Oh, Mr. Fennell --

13 MR. FENNELL: Yes, Your Honor.

14 THE COURT: -- the computer doesn't want you,  
03:57:41 15 so, I'm sorry, you will have to stay on the phone, but  
16 Mr. Gerstein is now on the speaker phone.

17 All right. Mr. Gerstein, you were going  
18 to explain some more.

19 Mr. Gerstein?

03:58:01 20 MR. GERSTEIN: Yes, Your Honor.

21 THE COURT: You were explaining something.

22 MR. GERSTEIN: Sure. So to clarify it for the  
23 Court, and I hope I am not repeating something already in  
24 the record, since the filing of this lawsuit Mr. Willey has  
03:58:15 25 accepted a position as full-time CEO for the charity. And

1 in full candor to the Court, so there is no  
2 misunderstanding, although the suit is filed in his  
3 individual capacity, Mr. Willey's charity would intend to  
4 engage in similar conduct if he prevails in this suit. So,  
03:58:33 5 although the charity is not a party, it is not that it has  
6 no interest in this litigation either.

7 THE COURT: All right. But it can't have its  
8 interests represented here.

9 MR. GERSTEIN: That's correct, Your Honor.  
03:58:54 10 Currently it does not. I'm not sure if it made it into  
11 the record and clarify the question the Court asked, when  
12 Mr. Willey was practicing in his private capacity, he was  
13 doing so in a fully volunteer basis on the behalf of those  
14 who could not afford an attorney. So to the extent Your  
03:59:11 15 Honor is interested in the distinction between his  
16 charitable private practice, I think for purposes of the  
17 First Amendment case, they are securely similarly situated.

18 THE COURT: Well, theoretically, there would be  
19 a lot of people who might like to do what Mr. Willey is  
03:59:31 20 doing but aren't because of the statute.

21 MR. GERSTEIN: That is correct, Your Honor.

22 THE COURT: So you understand the charity says,  
23 the IRS automatically revokes tax exempt status for any  
24 nonprofit organizations missing three consecutive years of  
04:00:02 25 tax filings.

1                   So the problem apparently was not they  
2 didn't have any charity. It was they didn't have any  
3 reports. You know how understanding the IRS is.

04:00:20 4                   MR. GERSTEIN: Yes, Your Honor. I am not aware  
5 of any issues with the tax filing for the charity. I can  
6 look into that and submit further briefing, but this is the  
7 first I have heard of it, Your Honor.

8                   THE COURT: So, apparently there are several --  
9 there's Restore Justice Foundation, Pressure Blood Ministry  
04:01:11 10 of Reconciliation, Restore Justice Illinois. None of those  
11 is here, right? We just -- we just have Mr. Willey?

12                   MR. GERSTEIN: That is correct. The only  
13 parties before the Court are Mr. Willey and District  
14 Attorney Ogg, Your Honor.

04:01:34 15                   THE COURT: How does Mr. Willey report --  
16 support himself?

17                   MR. GERSTEIN: At the time of the filing of  
18 this lawsuit, he maintained private practice of criminal  
19 defense law in Houston and Galveston. Since then, about  
04:01:48 20 six weeks ago he became full-time CEO of Restoring Justice,  
21 and I believe that he is going to focus primarily on that  
22 going forward.

23                   THE COURT: Well, I don't understand why I  
24 should enjoin a judge or the District Attorney in the  
04:02:48 25 absence of blood on the floor. I don't have the complete



1 history memorized, but if there is a need to stop the  
2 practice, that can be addressed in short order; but another  
3 month or two or three of delay with that statute having  
4 been in force for some time doesn't seem to me to be  
04:03:38 5 irreparable harm. And he is not representing the poor and  
6 downtrodden. He wants to represent them by sending  
7 communications to them about their existing lawyer; is that  
8 correct, Mr. Gerstein?

9 MR. GERSTEIN: That is correct, Your Honor.

04:04:03 10 And in terms of -- if this is an appropriate time to  
11 respond, please let me know.

12 THE COURT: No. That's why we gather.

13 MR. GERSTEIN: Thank you, Your Honor.

14 So, under *Elrod v. Burns*, a delay in -- in  
04:04:17 15 the attempt to vindicate his First Amendment right is  
16 treated as irreparable, the same with *Oppulant Life Church*.  
17 And just as a factual matter, I'll tell the Court, he is  
18 eagerly trying to set up his law practice now in a way that  
19 complies with the law but also vindicates his  
04:04:34 20 constitutional rights, and so he did not file a motion for  
21 preliminary injunction just as a matter of course.

22 He does seek relief from the Court as  
23 quickly as possible, notwithstanding that the statute has  
24 been in force for a while, and that's because he is -- his  
04:04:48 25 project is of recent vintage, and cannot continue without a

1 definitive statement is correct.

2 THE COURT: Well, I have actually read the  
3 Constitution. While it is not true that I threw a copy of  
4 it at a prosecutor, I did throw it to him. His poor  
04:05:19 5 catching may have made it a "to."

6 There are different kinds of irreparable  
7 harm, and this needs a thoughtful approach. The -- many of  
8 the State Bar's practices that clearly trenched on the  
9 First Amendment have been prudent over the years. In my  
04:06:02 10 case, many, many years.

11 But there is a difference from a  
12 competitive disruption of trying the state, really, but in  
13 this case the county's effort to find representation for  
14 the indigent is not intrinsically repressive. And, of  
04:06:43 15 course, barratry has applied to people making ten figures  
16 income. It's not a question of whether Mr. Willey wants to  
17 do it for charity or not. Having been in private practice  
18 myself, I did a whole lot of pro bono work that I had not  
19 intended to be pro bono.

04:07:10 20 And so we need to have some time, briefly,  
21 to make sure we understand the facts, and that is, in part,  
22 the practice under the barratry statute.

23 Mr. Durfee, do you want to give us an idea  
24 of what the actual practice is, like how many -- how many  
04:08:02 25 barratry cases does Harris County have on its docket?

1 MR. DURFEE: Your Honor, at the present time I  
2 don't have that statistic. I can tell you from having been  
3 a prosecutor for almost 32 years, that barratry is rare,  
4 but it is -- the barratry prosecutions are rare, but they  
04:08:22 5 are enforced. We have had barratry prosecutions in various  
6 contexts. And we have raised this specific issue with the  
7 District Attorney as to whether she wants to waive her  
8 prosecutorial discretion to prosecute these matters, and  
9 she wants to reserve that right as is accorded to her under  
04:08:45 10 the Texas Constitution and state law.

11 THE COURT: Give me an idea of one you  
12 prosecuted in the past, if you have the situation involved  
13 to mind. If you don't, I understand.

14 MR. DURFEE: I don't have -- I don't have a --  
04:09:01 15 I cannot in recent history recall a nonprofit entity  
16 engaged in this particular fact pattern, and that was what  
17 made this case unique was that we don't contest the idea  
18 that a nonprofit can go out and solicit clients to pursue a  
19 mode of expression like the *Button* case did.

04:09:24 20 Our concern, obviously, is on the much  
21 narrower issue of can a nonprofit go to somebody who is  
22 currently represented by counsel, and make a run at that  
23 client without doing the courtesy of informing that  
24 client's lawyer that they are doing it?

04:09:43 25 And that seems to be Mr. Willey's practice

1 in this situation.

2 THE COURT: Well, there's indirect competition  
3 for existing clients all the time, as you drive down the  
4 freeway, and say, "Hurt? Guaranteed results." I think  
04:10:01 5 they just guarantee you get a result, not any particular  
6 result.

7 So, you can't remember a charity. So  
8 we're dealing with routine competition.

9 MR. DURFEE: No, Your Honor.

04:10:24 10 THE COURT: Mr. Gerstein, has any state  
11 abolished barratry that you know of?

12 MR. GERSTEIN: I do not know, but I will  
13 represent to the Court that there are only three states  
14 that prohibit the solicitation of represented parties for  
04:10:50 15 nonpecuniary gain. They are Alabama, Arkansas, and Rhode  
16 Island. And Texas is the only state that criminalizes  
17 soliciting represented parties for nonpecuniary gain.

18 THE COURT: What's the difference between doing  
19 it for nothing, and doing it for half price of what the --

04:11:17 20 MR. GERSTEIN: So, according to the Supreme  
21 Court's decision in *Ohralik* and *Primus*, the distinction is  
22 between engaging in commercial speech and engaging in core  
23 political speech. At the same time the state's interest in  
24 regulating the practice of barratry for money is far  
04:11:35 25 greater than the state's interest in regulating the

1 practice of barratry for ideological purposes because, you  
2 know, as I am in nonprofit practice myself, and so when I  
3 speak to clients, it's only for the purpose of fulfilling  
4 our mission. But I can see how it would be much more  
04:11:50 5 difficult to set aside the client's concerns and various  
6 rules of decorum and practice when, you know, one's own  
7 salary depends on it. I think that's the notion underlying  
8 the Supreme Court's distinction, Your Honor.

9 THE COURT: The Supreme Court has made several  
04:12:12 10 phenomenally erroneous decisions about commercial speech.  
11 There is nothing in my Constitution that says no law except  
12 ones involving business. And so it should be broader --  
13 broadly construed. By the time you list all of the  
14 exceptions that have been allowed, it gets to be a crippled  
04:12:40 15 principle, but it's not -- it's not for Mr. Willey, or his  
16 charity, or -- to decide that not doing it for money makes  
17 them special because, obviously, they are -- they're  
18 billing the caring public by advertising and collecting  
19 gifts.

04:13:28 20 Somebody has to pay for the office, and  
21 the stationery that says "CEO" on it, and all that sort of  
22 thing. And so to draw a distinction between somebody who  
23 is ideologically stirring up trouble between clients and  
24 their counsel, and commercially doing it, seems like a  
04:13:54 25 false distinction.

1 MR. GERSTEIN: Your Honor, two responses to  
2 that. The first is to the extent that Your Honor's view is  
3 that this would be unconstitutional as applied to people  
4 engaging in commercial speech -- (audio interrupted due to  
04:14:13 5 technical problems, speech indiscernible.)

6 THE COURT REPORTER: I can't understand him,  
7 Judge.

8 MR. GERSTEIN: And under *Shapero v. Kentucky*  
9 *Bar Association*, I think it is true that the statute would  
04:14:24 10 be unconstitutional as applied to someone doing exactly  
11 what Mr. Willey did for money but in writing. At the same  
12 time, though, the distinction is a matter of existing  
13 Supreme Court law is what it is, and from my perspective,  
14 and Mr. Willey, particularly, wants to fall on the correct  
04:14:46 15 side of existing law.

16 THE COURT: Mr. Fennell, do you have anything  
17 you would like to add?

18 MR. FENNEL: No, Your Honor. I will -- I  
19 defer to Mr. Gerstein's argument. Thank you.

04:15:04 20 THE COURT: Are you all at the same place?

21 MR. GERSTEIN: We are not, Your Honor. I am  
22 in --

23 THE COURT: You're in the high rent district.

24 MR. GERSTEIN: Yes, Your Honor.

04:15:16 25 THE COURT: Although Austin is trying.

1 MR. FENNELL: They sure are. They sure think  
2 they're in competition.

3 THE COURT: Ms. Stevens, you want to add  
4 anything?

04:15:33 5 MS. STEVENS: No, Your Honor.

6 THE COURT: All right. The first thing I need  
7 from Mr. Willey is more precise factual data about what he  
8 is doing, how he's doing it, and then I need to know some  
9 cases he's done in this system.

04:16:08 10 Why doesn't Mr. Willey go over -- I'm not  
11 sure how it works in the state system -- and ask one of the  
12 state judges to appoint him at no cost?

13 MR. GERSTEIN: Your Honor, Mr. Willey is, in  
14 fact, eligible for appointments on the appointed counsel  
04:16:30 15 list. And the issue is that people who are already  
16 represented by attorneys carrying caseloads many multiples  
17 in excess of what state standards recommend, the people  
18 whom those people represent don't know that they have a  
19 right to anything other than what they they're receiving.  
04:16:49 20 So I think from Mr. Willey's perspective, it wouldn't solve  
21 the problem he is seeking to address.

22 But just perhaps at one higher level, it  
23 is not Mr. Willey's burden to show that his political  
24 speech is the best or the most efficient way of addressing  
04:17:04 25 a social problem, but rather the state's burden to show

1 that its restriction on his speech is narrowly tailored to  
2 foreign and compelling interests. So from his perspective,  
3 he has chosen this course of action and he has the right to  
4 engage in it, and would like to avoid being prosecuted for  
5 doing so.

04:17:23

6 THE COURT: Well, at the moment, this seems  
7 like the antisodomy law, and I believe it was in Georgia,  
8 where a deputy sheriff was serving papers on somebody in  
9 the apartment, and happened to see some people doing things

04:17:54

10 that apparently looked like they were violating the law,  
11 and he said nothing then or later. But the people who were  
12 observed filed a peremptory action, and contrary to my  
13 expectations, the Supreme Court took it after the district  
14 judge in Atlanta and the circuit court both said there is

04:18:23

15 no case or controversy here. The DA filed an affidavit  
16 that he had been DA 20 years, and never prosecuted a single  
17 case under the statute, and didn't intend to start now.

18 Mr. Willey has not been threatened with  
19 prosecution, other than it is the policy of the Harris  
20 County District Attorney to follow the law, and she has  
21 enough business from the six million people or so to not  
22 give her any motive to go look for business.

04:18:48

23 MR. GERSTEIN: Your Honor, it --

24 THE COURT: Yes, sir.

04:19:13

25 MR. GERSTEIN: Oh, I'm sorry. Is it --



1 (Audio interruption.)

2 THE COURT: It's going crazy, but it's not your  
3 fault.

4 MR. GERSTEIN: Glad to hear that. So, if -- if  
04:19:25 5 the District Attorney represents that she does not intend  
6 to prosecute conduct as described in the complaint, in the  
7 motion for preliminary injunction, this case would be moot,  
8 and we would be two happy people because Mr. Willey would  
9 not fear prosecution.

04:19:38 10 Unfortunately, unlike the Georgia case  
11 Your Honor was discussing, the District Attorney, as  
12 Mr. Durfee helpfully pointed out, explicitly has not  
13 disclaimed an intention to do that. If she would like to  
14 represent that she did not intend to prosecute Mr. Willey,  
04:19:55 15 then, I agree that there is no threat of irreparable harm.

16 THE COURT: Well, the problem with that is I  
17 don't think it's binding on the District Attorney, and I  
18 don't know that you know, but the district attorneys have  
19 districts by county, but the district attorney is, in fact,  
04:20:25 20 a state official, not a county official.

21 Apparently, a number of Texas founding  
22 fathers had unfortunate experiences with prosecutors  
23 somewhere in their past, and decided to keep them under  
24 close watch. They also didn't give our Attorney  
04:20:50 25 General any prosecutorial authority. They have changed it

1 for child support and something else.

2 Well, get him to do a very precise, brief,  
3 nonlegalistic statement of what he's done, how many cases  
4 he has gotten, how many letters he sent, copies of the  
04:21:23 5 letter, or two. I am not doing it off of charity's press  
6 release. I want to know the facts of what he has done, and  
7 did somebody threaten him with prosecution?

8 MR. GERSTEIN: Your Honor, so two things to  
9 address.

04:21:43 10 First, in the complaint, we detail exactly  
11 how many people he has contacted on how many occasions. I  
12 am pulling up the paragraph numbers. But he has  
13 communicated with 22 people represented by Mr. Jerome  
14 Godinich. That is Paragraph Number 30 in the complaint.  
04:22:00 15 So I think Your Honor's question is addressed by the  
16 complaint. We didn't submit anything from the charity or  
17 press release from the charity.

18 So I don't know if that addresses the  
19 concern, but...

04:22:24 20 I would also ask, Your Honor, if you would  
21 like further briefing, to help me understand what the  
22 relevance of more specific description of conduct would be.  
23 As our understanding of the law is, he has the First  
24 Amendment right, or he doesn't, but from our argument he  
04:22:39 25 has the First Amendment right to speak to people under

1 these circumstances, and there appears to be no dispute  
2 about what those circumstances are. So I think he has  
3 already satisfied the Court's concern for a specific record  
4 on that question.

04:23:07

5 THE COURT: I am a little troubled by  
6 Mr. Willey, being a lone wolf now, is also CEO of a defunct  
7 charity. Not sure it matters except if he is CEO, and he's  
8 -- I'll just -- shall I just assume that any cases he gets  
9 while he's acting alone will be handled through the

04:23:41

10 charity?

11 MR. GERSTEIN: I don't -- I can't be certain of  
12 that, Your Honor, but I don't know why there would be a  
13 distinction. To my knowledge, the charity is not defunct.  
14 I'm not sure why Your Honor thinks it is, but I can address  
15 that in further briefing.

04:23:57

16 I am --

17 THE COURT: Counsel -- counsel, just go on  
18 their website and there is a long explanation about their  
19 tax problems. They lost their standing with the IRS, which  
20 is not important, perhaps, to the people doing the work,  
21 but it is to the people funding it.

04:24:12

22 MR. GERSTEIN: Your Honor, if that's  
23 Restoringjustice.org, I don't see any such notice. There  
24 might be another charity named "Restoring Justice," but to  
25 my knowledge the charity where Mr. Willey is CEO is a

04:24:32

1 Houston based nonprofit serving indigent people with  
2 holistic criminal defense, and it remains in good standing  
3 with the IRS. I am looking at the website right now.

4 THE COURT: What's the name of it?

04:24:50

5 MR. GERSTEIN: Restoring, R-E-S-T-O-R-I-N-G,  
6 Justice, J-U-S-T-I-C-E dot O-R-G, the website.

7 And it appears to be fully tax deductible.

8 But just to make clear for the record, so the court

9 reporter gets this, we didn't submit any of this in the

04:25:10

10 record, and do not believe it is relevant to the case, but  
11 I'll read from the website now.

12 It reads, "Restoring Justice is a  
13 501(c) (3) nonprofit organization. All donations are tax  
14 deductible to the extent allowed by the law."

04:25:43

15 THE COURT: Well, there is a  
16 Restorejustice.org.

17 MR. GERSTEIN: Oh, that might be the issue,  
18 Your Honor. I think that is a different organization.

19 THE COURT: Well, the statement that they are

04:26:01

20 fully deductible to the extent of the law doesn't answer  
21 the question of are they deductible under the extent of the  
22 law which includes an IRS requirement that you file these  
23 annual reports?

24 So that's one of those universal phrases.

04:26:27

25 MR. GERSTEIN: Uh-huh. I'll represent to the

1 Court now I have no reason to think there is any issue with  
2 Restoring Justice's tax filing status, and I don't think it  
3 would be relevant to the issues before the Court if there  
4 was.

04:26:50

5 THE COURT: Well, the things charities do are  
6 not entirely different from what people do, that for-profit  
7 people do. They may be funded slightly differently. And  
8 churches raise their money by donations, too.

04:27:35

9 MR. GERSTEIN: That is right, Your Honor, but,  
10 again, Restoring Justice is not a party before the Court.  
11 I am looking right now at its 2018 990 report, Form 990 to  
12 the IRS. To my knowledge it appears to be in compliance,  
13 just to make sure that is clear for the record. But I  
14 don't -- I can't see what the relevance of that would be.

04:27:51

15 Mr. Willey is before the Court in his  
16 individual capacity. He has inferred that he intends to  
17 engage in conduct prohibited by the statute but protected  
18 by the First Amendment in the future under existing Supreme  
19 Court law that is quite clear gives Article III

04:28:07

20 jurisdiction to this Court, as defendant concedes.

21 I am -- I can speak to Mr. Willey about  
22 whether to supplement to the record, but I can't represent  
23 to the Court right now that Mr. Willey would be willing to  
24 do that.

04:28:36

25 THE COURT: Mr. Durfee, anything?

1 MR. DURFEE: No, Your Honor. Thank you.

2 THE COURT: All right. Well, I am going to

3 take this up. I may have some questions. And, Mr.

4 Fennell, we will try to get the phones fixed. We have been

04:29:00

5 working on them for three months.

6 MR. FENNEL: Yes, Your Honor.

7 THE COURT: Ms. Stevens?

8 MS. STEVENS: Nothing, Your Honor. Thank you.

9 THE COURT: All right. Thank you, Counsel.

04:29:17

10 MR. GERSTEIN: Thank you, Your Honor.

11 THE COURT: You may be excused, too.

12 MR. DURFEE: Thank you, Judge.

13 (Concluded at 4:29 p.m.)

14 COURT REPORTER'S CERTIFICATE

15

16 I, Kathleen K. Miller, certify that the foregoing is a  
17 correct transcript from the record of proceedings in the  
18 above-entitled matter.

19

20 DATE: Aug. 5, 2020

/s/ Kathleen K. Miller

21

Kathleen K. Miller, RPR, RMR, CRR

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